

# Quick Summary of How to Approach Electronic Media Issues in Consumer Cases

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# You need to understand E-Sign if-

Your client signed the contract on the seller's hardware, or the seller used an email address it owned to send the disclosures and contract to your client, and

- Contract terms are different than stated by the salesperson; and
- Your client did not see and/or receive disclosures that another law requires; or
- Your client did not receive the final terms of the contract and/or the notice of the right to cancel *immediately after* it was signed.
- Your client wanted to cancel the transaction but was unable to figure out how to do it from the electronic record they received.

# E-Sign is key to allowing electronic media to satisfy writing and signature rules.

- When a federal or state law or regulation *requires* a writing to be delivered to a consumer, how is that requirement satisfied when it is delivered electronically?
  - See E-Sign's consumer consent requirement.
- How does an electronic click count as a signature? How does clicking on a box on a website bind you to the terms of a contract?
  - The “signature” must meet E-Sign or UETA requirements.

# Rules for Electronic **Records**

## Replacing Writings with Electronic Records

1. For consumers, **E-Sign consent** is prerequisite to delivery of electronic record to satisfy writing requirement under federal and state laws. 15 USC 7001(c)
2. E-Sign consent requires a “**demonstration**” of the consumer’s ability to *access* electronic records. 15 USC 7001(c)(1)(C)(ii)
3. Without E-Sign consent, electronic records containing disclosures required to be in writing are not legally considered to have been *provided*. (But not a “gotcha” claim – consumer must really have not received them.)
  1. Examples: TILA, RISA, Notice of right to cancel.
  2. Then remedies under those other statutes are available.

# Rules for Electronic **Records** – 2

1. **E'Sign consent demonstration requirement is** probably not met if consumer accessed the disclosures on *seller's* hardware, or using an **email address supplied by the seller.**
2. E-Sign allows written disclosures provided electronically to be denied if record can be changed after signature 15 USC 7001(e).

# Rules for Electronic Signatures

## Satisfying a Signature Requirement with an Electronic Signature

Rules apply to **all signatures rendered electronically**:

1. “The term “electronic signature” means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.” 15 USC 7006(5)
2. E-Sign and UETA govern issue of *whether* the electronic sound or symbol provides legal equivalency for a *signature*.
  - a. Was there an *agreement* to conduct the transaction electronically?
  - b. Did client intend to sign *this particular electronic record*?
  - c. Was the electronic signature actually made by your client?
  - d. Is the signature “attached to or logically associated with” the electronic record (i.e. when they entered their signature did they see that it was applied to this particular contract)?

# Federal E-Sign Act and State UETAs only provides legal equivalency for electronic media

- 15 USC 7001 – Federal E-Sign Act
- (a) IN GENERAL. **Notwithstanding any statute, regulation, or other rule of law** (other than this subchapter and subchapter II), with respect to any transaction in or affecting interstate or foreign commerce—
  - (1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability **solely** because it is in electronic form; and
  - (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability **solely** because an electronic signature or electronic record was used in its formation.
- State Law § 7 of the Uniform Electronic Transactions Act (**UETA**) says essentially the same.
- **These statutes are NOT intended to facilitate fraud.**

# Main Message here

- Contract, fraud, UDAP, forgery, claims all still apply to the transaction even if **electronic records** and/or **electronic signatures** were involved.
- Make relevant claims under the *other laws* as you would if only paper were involved.
- Do not mention E-Sign compliance or lack of it in your pleadings.
- If the seller or lender used electronic **records** to provide written disclosures *it is up to them to prove that* they complied with E-Sign.
- If the seller or lender is maintaining that a **click** is your client's **signature**, it is up to them to prove compliance with requirements in your state UETA.



# Sources

- All of this and much more is written up in [Consumer Banking and Payments Law](#), Chapter 13
- Free access to this chapter is available to any subscriber of other NCLC manuals.
- Also, a video training is available here:
  - <https://www.consumeradvocates.org/events/upcoming/piercing-the-light-e-sign-in-solar-cases/>

